Supreme Court, U.S.
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No. 03-419

IN THE

Supreme Court of the United States

J.P. MORGAN CHASE & CO., *et al.*,

Petitioners,

v.

THE RETIREMENT SYSTEMS OF ALABAMA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Petitioners was set forth at page *iii* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

The Petition raises the highly important question whether Congress has the power to foreclose this Court's ability to review classes of decisions by inferior Article III courts based on the legal content of those decisions. Petitioners submit that such foreclosure violates the Exceptions Clause, U.S. Const. art. III, § 2, cl. 2. The statutes at issue, 28 U.S.C. §§ 1334(d) and 1452(b), *completely* withdraw from this Court's scrutiny district court decisions to abstain from federal bankruptcy jurisdiction, including where, as here, the district court justifies abstention on grounds of comity with state interests. Thus, the statutes not only strip this Court of the appellate jurisdiction the Constitution secures to it, they do so in an area of law that demands sensitive balancing of state and federal interests in decisions governing the exercise of federal jurisdiction.

The urgency of review here is further underscored by the statutes' real world consequences. This Court, through Justice Story, once explained that it was essential that one tribunal finally and conclusively decide federal questions to ensure uniformity in the interpretation of federal law. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816). The *WorldCom* litigation is an example of the doctrinal confusion and discordant rulings that Justice Story's opinion decries. The absence of appellate review over bankruptcy abstention decisions has spawned divergent case law at the district court level, with some district courts (such as the district court below) making substantial departures from settled abstention doctrine. These discordant rulings result not from application of the same legal principles to variant facts, but from disagreement over the substance of the legal principles themselves.

Respondents' rejoinder is diversionary. In discussing the criteria for granting review under this Court's Rule 10, they principally assert that this Court should decline review because there is no circuit conflict. (*See* Brief in Opposition ("Opp. Br.") at 4-7.) But Petitioners never relied on the logic of circuit

conflicts to justify this Court's review. Indeed, such a showing would be impossible because to date, aside from the Eleventh Circuit Court of Appeals, no other court has ever ruled on the question here presented.[1]

Respondents thus fail to counter Petitioners' showing that the question presented is in and of itself important. Nor can they dispute that abstention decisions in the district courts are discordant, a fact starkly demonstrated by the *WorldCom* litigation.[2] Respondents' at best meager showing confirms that a grant of certiorari in this case is warranted.

I. The Question Was Presented and Decided Below

Respondents contend that the question presented in the Petition "was not before or decided by the United States District Court below or by the Court of Appeals." (Opp. Br. at 1.) The statement concerning the court of appeals is demonstrably false; the statement about the district court is true, but irrelevant.

The district court could not have decided the question presented in the Petition because a challenge to the constitutionality of a statute that bars appellate review is not

1. In this vein, Respondents cite a string of circuit decisions (*see* Opp. Br. at 6-7) to suggest that the cases unanimously stand opposed to Petitioners' position. But none of the cited cases addressed the question presented by the Petition. These cases held unremarkably that 28 U.S.C. § 1334(d) and/or 28 U.S.C. § 1452(b) bar appellate review of abstention decisions.

2. Respondents remark that "the Petition fail[s] to cite any 28 U.S.C. § 1334(c) and (d) statutory abstention decision of this Court, of a Court of Appeals, or of the highest court of a state, which is contrary to the decision of the District Court and of the Eleventh Circuit." (Opp. Br. at 5-6.) The Petition amply demonstrates that the district court's opinion is at odds with abstention principles and that it clashes with other district court opinions. Otherwise, a search for appellate opinions criticizing the district court's decision would be futile, given the statutory bar on appeals. Similarly, the Eleventh Circuit's decision does not conflict with any other because, as explained, no other case addresses the Exceptions Clause question.

ripe until the district court has entered a final order. *See Doleac ex rel. Doleac v. Michalson*, 264 F.3d 470, 492 (5th Cir. 2001). The first opportunity to raise the question, therefore, was before the court of appeals, which is precisely what Petitioners did. That Petitioners raised an Exceptions Clause challenge before the Eleventh Circuit cannot in good faith be disputed. It is unnecessary even to take the modest step of looking at the record below because Respondents' brief confirms this fact. The lengthy passage Respondents quote from the United States' brief in the court of appeals in part states: "Defendants' [i.e., Petitioners'] sole constitutional complaint is that Congress exceeded its Exception Clause power by shielding abstention orders from *Supreme Court* review." (Opp. Br. at 3 (emphasis in original).)

There also can be no question that the court of appeals decided the Exceptions Clause question. Citing *Felker v. Turpin*, 518 U.S. 651 (1996), the court of appeals first held that it had jurisdiction to determine the constitutionality of 28 U.S.C. §§ 1334(d) and 1452(b).[3] It then held that the statutes were constitutional on the authority of *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), both of which were Exceptions Clause cases. If the court of appeals was not deciding the Exceptions Clause issue, there would have been no reason for it to refer to these decisions.

In the face of this clear record, Respondents attempt to obfuscate the issue by asserting that the Eleventh Circuit addressed only the constitutionality of the statutes' bar on appellate review by courts of appeals. (*See* Opp. Br. at 2-3.) Here, Respondents conjure a "severability" hypothesis to state that the court of appeals could have ruled (and in fact did rule)

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3. Therefore, when the court of appeals stated that it lacked jurisdiction to decide whether the district court's abstention was proper (*see* Opp. Br. at 1-2), it was merely stating that it had already concluded that there was no Exceptions Clause violation and that the statutory bar on appellate review of abstention-based remand orders remained in force. Respondents' contrary gloss misapprehends the court of appeals' decision.

on the constitutional validity of the prohibition on its review without actually reaching the legitimacy of the foreclosure of this Court's appellate jurisdiction. (*See id.* at 3.) This argument is fundamentally flawed because, as explained, the Eleventh Circuit actually ruled on the Exceptions Clause question and, therefore, on the validity of the statutes' prohibition on review by this Court. In all events, the distinction Respondents seek to draw is at best metaphysical because, in the context of bankruptcy abstention orders, foreclosure of appellate review in the courts of appeals itself would result in an Exceptions Clause violation. The reason stems from the manner in which Congress has regulated the appellate jurisdiction of the federal courts.

As a general matter, for cases coming through the federal system, the certiorari or certification jurisdiction of this Court is properly invoked only with respect to cases in the courts of appeals. *See* 28 U.S.C. § 1254. The courts of appeals, in turn, have jurisdiction to review final decisions of the district courts "except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. Therefore, litigants may not as a general matter repair to this Court upon disappointment with a result in a district court. Direct appeal from a district court to the Supreme Court must be specifically authorized by statute. Such statutes exist to be sure, *see* 28 U.S.C. § 1253 (permitting direct appeals to this Court from orders granting or denying injunctions in civil actions required by an Act of Congress to be heard by a district court of three judges); 28 U.S.C. § 2284 (requiring a district court of three judges to hear actions challenging the constitutionality of congressional district apportionments); 47 U.S.C. § 555(c) (constitutional challenges to 47 U.S.C. § 534 or 535 to be heard by a district court of three judges), but there is none that permits direct review in the circumstances of this case.

Thus, with respect to the statutes at issue here, to bar courts of appeals from reviewing abstention orders is tantamount to withdrawing such orders from this Court's scrutiny, which

amounts to an Exceptions Clause violation. Thus, Respondents' "severability" hypothesis is meritless even on its own terms.

II. The Jurisdiction-Stripping Provisions of 28 U.S.C. §§ 1334(d) and 1452(b) Violate the Exceptions Clause

Respondents offer miscellaneous assertions attacking the substance of Petitioners' Exceptions Clause arguments. The assertions are mostly irrelevant and none has merit.

1. Respondents claim that Petitioners argue that 28 U.S.C. §§ 1334(d) and 1452(b) "forbid all access to review of this case" (Opp. Br. at 7) in this Court. This is a severe overstatement. Petitioners never have suggested that issues properly raised and preserved in a remanded action cannot be the subject of a petition for certiorari under 28 U.S.C. § 1257. Petitioners point *only* to what §§ 1334(d) and 1452(b) actually foreclose, which is review of abstention and remand decisions by federal district courts. This distinction is critical because abstention orders do *not* form part of the remanded action and, therefore, contrary to Respondents' supposition, cannot be the subject of a certiorari petition under § 1257 from the final decision of a state court of last resort. (*See* Opp. Br. at 7).

Respondents similarly misapprehend the relevance of mandamus and the *Waco* doctrine. The statutory language, which forbids review "by appeal or otherwise" of decisions to abstain or not to abstain, encompasses mandamus. *See In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 388-89 (3d Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003); *In re United States Brass Corp.*, 110 F.3d 1261, 1266 (7th Cir. 1997) (Posner, J.). Mandamus review is possible when the appeal does not request substantive review of the abstention decision but only a determination whether the entry of an abstention-based remand amounted to an abuse of judicial power. *See Allied Signal Recovery Trust v. Allied Signal Inc.*, 298 F.3d 263, 270 (3d Cir. 2002); *In re Dow Corning Corp.*, 113 F.3d 565, 569 (6th Cir.),

cert. denied, 522 U.S. 977 (1997). Petitioners, however, seek substantive review of the remand order.[4] The *Waco* doctrine is inapt because it only permits review of remand orders to the extent they resolve substantive merits issues that would have preclusive effect on the post-remand litigation in state court. *See City of Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140, 143 (1934). This case obviously does not implicate the *Waco* doctrine.

2. The Petition does not raise a question concerning the Supremacy Clause. The discussion in Section III (*see* Opp. Br. at 10-11) is irrelevant.

3. Respondents next contend that because the right to removal is a statutory procedural right created by Congress, it is "subject to the established rule that there is no vested constitutional right to a mode of procedure." (Opp. Br. at 13) Respondents again misapprehend Petitioners' position. As the passage Respondents quote from *Doleac* reveals, the cases that address whether there is a "vested constitutional right to a mode of procedure" all concern due process. (*See id.*) This is not a due process case, it is an Exceptions Clause case. Rights afforded to individuals by due process are not coextensive with the limitations imposed on Congress by the Exceptions Clause. Different constitutional provisions that are addressed to different concerns are analyzed differently. *See Crowell v. Benson*, 285 U.S. 22, 45-54 (1932) (distinguishing the analysis of due process and Article III-based claims, even though they arose from the same set of core facts).

4. The suggestion that *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), *overruled in part by Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), somehow may permit review here is also mistaken. That decision construed 28 U.S.C. § 1447(d) – not 28 U.S.C. § 1334(d) as Respondents contend (*see* Opp. Br. at 8) – and concluded that substantive review of remand decisions is forbidden unless remand is based on an extra-statutory factor. *See Thermtron Prods.*, 423 U.S. at 351-52. By its terms, the principle underlying *Thermtron Products* is inapplicable here, where Petitioners seek substantive review of the abstention order.

Respondents are also wrong to assert that, by virtue of its power to create a statutory right to removal, Congress has "plenary power" to limit appeals to this Court. (*See* Opp. Br. at 11-12.) The argument proves too much. Congress has plenary authority to create statutory causes of action and procedural rules in all areas in which it legislates. Yet one cannot plausibly argue that Congress has "plenary power" to withdraw the Supreme Court's appellate jurisdiction in *all* of these instances. Recognition of such authority would allow Congress to withdraw completely this Court's appellate jurisdiction and thus give currency to the observation that the "Exceptions will swallow the rule." As in other areas of constitutional law, the "greater" power here does not include the "lesser." *See, e.g.*, *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002). Just because Congress may have plenary power to *create* procedural rights does not confer upon it absolute license to *withdraw* them from this Court's appellate jurisdiction once they have been created.

4. Turning to the Exceptions Clause (*see* Opp. Br. at 14), Respondents make two basic assertions. First, they contend that the history of Congress's legislation shows that it has had plenary power over this Court's appellate jurisdiction. (*See id.* at 15-16.) Second, they posit that this Court itself has held that Congress enjoys this sweeping power. (*See id.* at 16-20.) Both contentions are incorrect.

So long as it remains the province of the judiciary "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), particularly on the subject of the Constitution, Acts of Congress must give way. *See id.* at 176 ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); *see also United States v. Morrison*, 529 U.S. 598, 616 (2000) ("Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace."). The mere fact that legislation has survived for many years does not immunize it from constitutional scrutiny.

See, e.g., *INS v. Chadha*, 462 U.S. 919, 941-42 & n.13, 959 (1983) (striking down legislative veto, which Congress had been enacting for fifty years). The history of Congressional enactments cannot, therefore, settle the issue.

In all events, historical trends support Petitioners' reading of the Exceptions Clause. For instance, Respondents mistakenly characterize the grant to this Court in 1802 of jurisdiction in federal criminal cases "where the judges of the circuit court were divided on a question of law" (*see* Opp. Br. at 15) as an exercise of the Exceptions power. In truth, this was an exercise of Congress's power to *regulate* this Court's appellate jurisdiction, *see* U.S. Const. art. III, § 2, cl. 2, and this particular exercise comports perfectly with Petitioners' understanding of the Exceptions Clause, because it preserves this Court's ability to ensure uniformity in federal criminal law.[5] The other evidence adduced by Respondents, construed most favorably to their stance, bespeaks a constant expansion of this Court's appellate jurisdiction over time. This supports the view that there in fact is a developing consensus that all questions of federal law decided by Article III courts must in some way have the opportunity to reach this Court.

Respondents' reading of case law (*see* Opp. Br. at 18-19) was anticipated in the Petition. As explained there, the broad pronouncements in some of this Court's decisions must be tethered to the controlling facts therein presented. Otherwise, taken to their logical conclusion, those pronouncements would recognize a plenary power to control this Court's appellate jurisdiction that Congress clearly does not possess, and cannot

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5. Whereas an "exception" completely forecloses this Court's ability to review a case or question, "regulation" merely affects the mode in which the case may reach this Court's docket and the manner in which this Court may exercise its appellate jurisdiction. Thus, contrary to Respondents' supposition (*see* Opp. Br. at 16), Congress's provision for certiorari jurisdiction does not constitute an "exception" but a "regulation," because such jurisdiction does not at all forbid this Court's review of any classes of cases.

possess if this Court properly is to fulfill its constitutional responsibility of ensuring the uniformity in interpretation of federal law.[6]

5. Respondents' assertion that neither *Mangus v. Miller*, 317 U.S. 178 (1942), nor *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), "involved abstention in the context of bankruptcy-related cases" (*see* Opp. Br. at 20-21) is frivolous. The legislative history of 28 U.S.C. § 1334(c)(1) – the bankruptcy abstention statute here relevant – identifies the paradigm for abstention as follows: "'The [discretionary abstention] subsection recognizes the exigencies that arise in such cases as *Thompson v. Magnolia Petroleum*, 309 U.S. 478 . . . (1940), in which it is more appropriate to have a State court hear a particular matter of State law.'" *In re Pan American Corp.*, 950 F.2d 839, 846 (2d Cir. 1991) (alteration in original) (quoting H.R. Rep. No. 95-595, at 446 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6401). As the Second Circuit recognized, § 1334(c) "codifie[s] *Magnolia Petroleum*." *Pan American*, 950 F.2d at 846. Because Congress intended for "statutory" abstention to mimic "non-statutory" abstention doctrine, Respondents' attempt to distinguish between "statutory" and "non-statutory" abstention (*see* Opp. Br. at 21-22) *a fortiori* fails. The cases cited by Respondents (*see id.*) do not stand for a contrary proposition; the reason why abstention was deemed unreviewable in those cases was because, unlike 28 U.S.C. § 1447(d) (which was the statute at issue in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), and from which abstention-based remand orders are exempt, *see id.* at 711-12), 28 U.S.C. §§ 1334(d) and 1452(b) specifically prohibit review of abstention orders.

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6. Respondents are also incorrect to assert that Petitioners advocate limiting the exceptions power to precluding review of questions of fact. (*See* Opp. Br. at 16.) Congress may prohibit review of questions of law, but they must be done in a manner that is neutral with respect to legal content, such as amount-in-controversy limitations.

6. The final quiver in Respondents' bow is that this Court should forego review because the case has advanced in state court. (*See* Opp. Br. at 22-23.) The point is factually incorrect and legally irrelevant. Respondents do not, and cannot contend, for example, that the controversy is moot. Relief for Petitioners will be timely, moreover, because the litigation in state court is only in its preliminary stages, with discovery tracking the multidistrict litigation in the Southern District of New York (where this action should have been transferred in the first place (*see* Petition at 2-8)). The constitutional question here presented is ripe for immediate consideration and decision.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, Petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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